

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DENNIS BATES, ET AL., :
4 Petitioners :
5 v. : No. 03-388
6 DOW AGROSCIENCES, LLC. :
7 - - - - -X
8 Washington, D.C.
9 Monday, January 10, 2005
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.
13 APPEARANCES:
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15 the Petitioners.
16 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the
17 Respondent.
18 LISA S. BLATT, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Respondent.
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P R O C E E D I N G S

(11:03 a.m.)

JUSTICE STEVENS: We'll hear argument in Bates
against Dow AgroSciences.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONERS

MR. FREDERICK: Thank you, Justice Stevens, and
may it please the Court:

Pesticides are economic poisons designed to kill
living things. Sometimes they do not work as designed.

For more than a century until the 1990's, courts
routinely permitted farmers to bring claims against
pesticide manufacturers for crop damage caused by
pesticides. In enacting amendments to FIFRA in 1972,
Congress did not intend to displace those preexisting
State law remedies.

The farmers here allege claims for defective
design, defective manufacturing, fraud, breach of
warranty, and failure to warn for a brand new product that
severely damaged their peanut crops. I'd like to start
with our narrowest theories for reversal and demonstrate
for three reasons why those claims survive preemption.

The defective design and manufacturing claims
challenge the product's composition, not its label. The

1 fraud, warranty, and negligence claims involve general
2 legal duties, not pesticide-specific requirements, and the
3 failure to warn and fraud claims are not different from or
4 in addition to FIFRA requirements.

5 Now, with respect to the first point, Dow
6 concedes at pages 43 and 49 of its brief that defective
7 design and manufacturing claims generally are not
8 preempted. That concession warrants a remand here, as
9 this case was decided before discovery, enable the farmers
10 to develop their claims.

11 JUSTICE GINSBURG: But couldn't you make every
12 failure to warn claim a defective design claim? That is,
13 they didn't warn about the effects, but those effects
14 would not have been present if the product had been
15 designed to assure that there wouldn't be any adverse
16 effect on the peanut crop.

17 MR. FREDERICK: Justice Ginsburg, the way the
18 Restatement of Torts and Product Liability in sections 1
19 and 2 describe, there are basically three theories that
20 products liability claims can proceed on: a defective
21 design, defective manufacturing, and defective warnings.
22 The restatement explains that they are distinct legal
23 theories that go to different problems that the
24 manufacturer has caused with respect to the product. A
25 defective design claim asserts that the composition was

1 inadequate and that a properly designed product could have
2 been put on the market that would not cause the harm.

3 JUSTICE O'CONNOR: Mr. Frederick, on the
4 defective design claim, presumably that's based on a
5 factual theory that Dow could have reasonably designed
6 Strongarm to be safe for growing peanuts in high-acid
7 soil.

8 MR. FREDERICK: Correct.

9 JUSTICE O'CONNOR: But doesn't that mean your
10 client should have to put forward some evidence
11 establishing a material issue of disputed fact on that
12 point?

13 MR. FREDERICK: Certainly, but here --

14 JUSTICE O'CONNOR: And it didn't do that.

15 MR. FREDERICK: Well here, Your Honor, the
16 motion for summary judgment that Dow filed was not based
17 on the merits of the claims. It was based on them being
18 preempted, displaced as a matter of Federal law. They
19 also asserted a limitation of -- of remedy provision.

20 But we never had discovery in this case. The
21 district court, after finding jurisdiction, considered
22 Dow's motion for summary judgment on preemption and locked
23 us out of the courthouse door before we ever had a chance
24 to prove that a safer design for the product could have
25 been made. And that's where we think the court's decision

1 below was overbroad and should be reversed.

2 JUSTICE KENNEDY: The -- the problem I have with
3 -- with the Government's case and with the respondent's
4 case is that -- it's really the obverse of what Justice
5 Ginsburg said. Their problem is that they would recast
6 everything as a warning.

7 MR. FREDERICK: That's absolutely correct.

8 JUSTICE KENNEDY: Does the restatement have some
9 specific provisions that say no matter how good the
10 warning is, you're still entitled to proceed when there's
11 a -- I don't know -- dangerous product or defective
12 product or something?

13 MR. FREDERICK: Yes. Restatement sections 1 and
14 2 address this, and what the restatement says is that if
15 you can show that the product could have been reformulated
16 to be properly designed, then the existence of a warning
17 that might go to certain of its uses would not negate a
18 defective design claim. The Texas Supreme Court --

19 JUSTICE KENNEDY: Even -- even if the warning
20 specifically covered that design defect?

21 MR. FREDERICK: That -- that's -- that's
22 correct. And what the restatement --

23 JUSTICE KENNEDY: So even if this product said,
24 warning: may not be effective in high pH soils, that's
25 not good enough?

1 MR. FREDERICK: Under the restatement rule,
2 which Texas has adopted in the Uniroyal case, which we've
3 cited in our brief I think at page 47, that is true
4 because the restatement explains that there are certain
5 warnings that could be ignored or not observed or not
6 understood properly and that if it can be proved that a
7 properly designed product would be on the market, there
8 are public policy reasons why that's what we want to
9 encourage manufacturers to do. I mean, under --

10 JUSTICE SCALIA: At any cost? I mean, what if
11 it -- you know, yes, I can -- I can sell you stuff that
12 will -- that will work in high pH soil, but it's going to
13 be three times as effective. Do I have to sell it?

14 MR. FREDERICK: Well, the --

15 JUSTICE SCALIA: Can't I just sell it for those
16 people who don't need it for -- for high pH soil at a
17 third the price with a warning that says, hey, by the way,
18 don't use this in high pH soil? It's crazy to say you
19 can't do that.

20 MR. FREDERICK: Justice Scalia, to answer your
21 question in several ways, that's a jury determination to
22 -- to ascertain the reasonableness of the alternate design
23 that the manufacturer would be asked to -- to do or to
24 market a separate product that was separately designed for
25 high-acid soils.

1 JUSTICE KENNEDY: But it's never a question of
2 the reasonableness or the adequacy of the warning?

3 MR. FREDERICK: I don't think it's a question of
4 warnings in this sense, Justice Kennedy. If you take
5 their theory, which is that a defective design claim
6 always collapses to a failure to warn, they can put out a
7 defectively designed product that admittedly causes harm,
8 and all they have to do is change the label and say, if
9 used in these particular circumstances, it may cause harm,
10 because that would necessitate a change to the label --

11 JUSTICE BREYER: Oh, not necessarily. It
12 wouldn't be always either way. I would think that if in
13 fact you have a product and the product causes harm in a
14 subset of cases, which you could warn against, then a jury
15 could decide whether the unreasonableness consists of not
16 having designed the super-safe product or the
17 unreasonableness consists of not having had a different
18 label.

19 MR. FREDERICK: And that -- there are -- that's
20 why the restatement makes clear that there are distinctive
21 theories for defect --

22 JUSTICE BREYER: And you're arguing that in this
23 case you have the first.

24 MR. FREDERICK: That's correct.

25 JUSTICE BREYER: It seems implausible on -- you

1 know, --

2 MR. FREDERICK: Well, we have both actually.

3 JUSTICE BREYER: -- because all they'd have to
4 do is don't use it in pH soil.

5 MR. FREDERICK: No. We have defective warning
6 too, and -- and if I can address that as well. The
7 statute here prohibits in section 136q(1) any false or
8 misleading statement in the label as to any particular.
9 Our position is that the 2000 label said, suitable for
10 peanut-growing areas in all places where peanuts are
11 grown. That was false. Under the statute, that is a
12 misbranding, and that is actionable as -- both as a
13 failure to warn, as a fraud claim, and as a breach of
14 warranty.

15 Now, the Medtronic majority made absolutely
16 clear that that kind of claim is not preempted, and in
17 fact all nine Justices agreed that when the State law
18 claim is parallel to the Federal requirements, the
19 existence of a State law remedy is not an additional
20 requirement.

21 JUSTICE KENNEDY: So on -- on that aspect of the
22 case, you put in your pleadings that this was a violation
23 of FIFRA.

24 MR. FREDERICK: We don't necessarily need to say
25 a violation of FIFRA is -- so long as the requirement is

1 the same, although we can certainly --

2 JUSTICE KENNEDY: Well, that's a -- that's a bit
3 different. You were -- you were asserting a moment ago I
4 thought -- please correct me if I'm wrong -- that this was
5 a violation of FIFRA because it was misbranded.

6 MR. FREDERICK: I --

7 JUSTICE KENNEDY: So it seems to me that you
8 then have a suit under FIFRA, but I don't think that was
9 the theory of your complaint.

10 MR. FREDERICK: No. The theory of our complaint
11 was a failure to warn both for negligence and as a
12 defective product.

13 JUSTICE SOUTER: But the reason for that, I take
14 it, is that FIFRA does not -- I mean, I think you agree
15 FIFRA does not provide an independent private right of
16 action.

17 MR. FREDERICK: That's correct.

18 JUSTICE SOUTER: So you've got to sue under
19 State law, but you would -- you would kind of have a slam
20 dunk for your position, I suppose, if your pleading said,
21 the failure to warn only to the extent that in fact the --
22 the warning given in compliance with FIFRA was an
23 inadequate warning. That would -- that would keep you
24 within the -- the -- in effect, the -- the Federal limit,
25 and it would also make clear that you had a State law

1 cause of action, not a Federal cause of action.

2 MR. FREDERICK: That's correct, and because --

3 JUSTICE SOUTER: And -- and that's in effect
4 what you're arguing.

5 MR. FREDERICK: Yes. And -- and because of the
6 preliminary of this suit, Justice Kennedy, we certainly
7 should have the opportunity to amend our complaint. There
8 are counterclaims that this is done at the motion for
9 declaratory judgment.

10 JUSTICE BREYER: In your view -- in your -- your
11 opinion, if you were to follow that, would EPA -- suppose
12 EPA does the following. EPA looks into this and they
13 publish a reg that says in this case or in this subset of
14 cases, or some kind of description that fits yours, we
15 think that the labeling should be thus and so and we think
16 that State tort suits will interfere with our ability to
17 promote the uniform labeling and therefore they're
18 preempted. Can the EPA do that on your theory?

19 MR. FREDERICK: Yes, it can and the -- the
20 interesting aspect of this, Justice Breyer, is that of
21 course EPA hasn't done that. EPA has made very clear it
22 never tested for efficacy. It never even gave notice and
23 comment so that --

24 JUSTICE O'CONNOR: Well, EPA has -- has waived
25 efficacy data requirements. Right?

1 MR. FREDERICK: Yes.

2 JUSTICE O'CONNOR: Now, is it your position that
3 a State can pass a law requiring labels to have efficacy
4 claims?

5 MR. FREDERICK: They have to do it pursuant to
6 their powers under 136v(a) which is the regulation of sale
7 or use or under 136v(c) which says that when a State
8 designates a particular locality requirement and a special
9 need, it can impose a label -- it can impose requirements
10 that the manufacturer has to comply with.

11 Now, the EPA importantly -- and this is in their
12 regulations at 163.152 -- has specifically said that
13 States have labeling authority. The States can impose
14 labeling requirements. Now, there's no reason why --

15 JUSTICE O'CONNOR: But you're not relying on
16 that in this cause of action.

17 MR. FREDERICK: No, Justice -- no, Justice
18 O'Connor, except to the extent that if the State can
19 affirmatively do it through a positive regulation, their
20 theory has to be wrong that the -- that any incidental
21 effect that induces a change to label is preempted. That
22 theory has to be wrong, and that's what the Fifth Circuit
23 relied on.

24 JUSTICE O'CONNOR: Well, does -- does FIFRA
25 require the manufacturer to say on the label what the item

1 can be used for?

2 MR. FREDERICK: Yes, but I want to address --

3 JUSTICE O'CONNOR: So how -- how does an express
4 warranty claim escape preemption --

5 MR. FREDERICK: As the --

6 JUSTICE O'CONNOR: -- where -- where Dow just
7 says the federally mandated statement is included on my
8 label and it's true?

9 MR. FREDERICK: A warranty claim, Justice
10 O'Connor, as this Court made clear in the Cipollone case,
11 is not a requirement under State law because it's a
12 voluntary contractual arrangement between the parties.
13 The Court I think has made clear that what has to be
14 ascertained here is does the State cause of action or the
15 State law create a requirement. That's not true in the
16 warranty case because FIFRA doesn't speak to requirements
17 in -- as to warranties. It speaks to requirements in
18 other ways.

19 So what Dow did here with its warranty was
20 completely voluntary, and the fact that it breached that
21 warranty by putting on the market a product that was not
22 suitable for the use in all areas where peanuts are grown
23 is a breach of a warranty that it voluntarily undertook.
24 Breach of that is not a requirement imposed under State
25 law. And that has been, I think, verified by seven

1 Justices of this Court in the -- in the Cipollone case.

2 Now, if I could speak to the fraud claim, it is
3 important to understand that in both Cipollone and in a
4 footnote in Medtronic, the Court made clear that where
5 there are general legal duties that are not observed by
6 the manufacturer that don't go to the specific product
7 itself, those claims are not preempted.

8 Here our assertion is that Dow put on the market
9 a -- a product that was mislabeled and that they went out
10 and told people fraudulently was suitable for their uses.
11 We acted in reliance on that and we suffered damages.
12 Those are general legal duties, not pesticide-specific
13 ones. And the existence of the preemption clause of
14 136v(b) does not displace us from the opportunity to try
15 to prove to a court that fraud was committed here.

16 Now, if I could briefly address two points. One
17 is that the inducement to change theory should be
18 rejected. That was the basis on which the Fifth Circuit
19 decided this case and it is an overly broad theory for
20 several reasons.

21 First, it's not supported by the text of 136v(b)
22 which says requirements for labeling. It doesn't say
23 requirements that induce a change to the label. And
24 that's how many of the courts have gone off track since
25 the Cipollone decision was announced by this Court. They

1 have read FIFRA as saying just because the word
2 requirements is 136v(b), thereby any State law claim that
3 imposes a requirement that might induce a manufacturer to
4 change the label is thereby preempted. We think that's
5 overly broad because it confers way too much discretion on
6 manufacturers to decide what to put on labels, and they
7 can claim immunity for any overly broad claim of efficacy
8 so long as when they are sued, they can say we're induced
9 to change the label.

10 Because EPA does not evaluate the specific
11 contents with respect to efficacy or the claims that are
12 made on -- on a label, if a manufacturer makes an overly
13 ambitious statement as to efficacy, all the manufacturer
14 has to do under the inducement to change theory is go to
15 court and say we would have to change the label and
16 thereby 136v(b) preempts it.

17 Now, I'd also like to stress that the other
18 side's theory creates a huge regulatory gap. As your
19 question, Justice O'Connor, noted, the EPA does not
20 evaluate efficacy on the front end. And in fact, the
21 history behind these provisions is that EPA understood
22 from the very beginning that common law claims would serve
23 an important incidental regulatory effect.

24 If we could review the history for a moment.
25 Prior to the 1972 changes to FIFRA, for decades farmers

1 had brought claims against manufacturers for design
2 defect, for failure to warn, for the kinds of common law
3 claims that we have asserted in this case. It was so well
4 established by 1972 that there was a huge section in the
5 American Law Reports that annotated all the cases and
6 explained what the common law duties of pesticide
7 manufacturers were. Yet, notwithstanding that, when
8 Congress enacted the 1972 act, despite thousands of pages
9 of hearings, committee reports, legislative debates, there
10 is not one mention of any effort to displace those
11 preexisting common law claims.

12 And when EPA, in discharging its
13 responsibilities under the 1972 act, got overwhelmed by
14 the requirement that it re-register products that were
15 already out on the market, pursuant to the 1972 act's
16 standards, it very promptly went to Congress and said, you
17 should waive efficacy requirements because we simply can't
18 do this. Congress responded, but importantly in the
19 administrations on both sides, EPA has always understood
20 except until just a couple of years ago when the Solicitor
21 General changed the position of the Government, that these
22 kinds of incidental common law suits would have an
23 important regulatory effect.

24 If we could just take the case of DDT. For 30
25 years, manufacturers were sued for DDT and awarded damages

1 until it became clear that the groundswell over the course
2 of decades that DDT needed to be banned, and it was only
3 at the back end that the expert agency regulators
4 determined that in fact the product needed to be banned,
5 but that was only after a very long history in which
6 common law suits had provided remedies to farmers and
7 others who were harmed by that product.

8 Now, in 1982, the Reagan administration's EPA
9 expanded the efficacy waiver and it included far greater
10 products than had been done in the Carter administration
11 in 1979. And in the Federal Register notice announcing
12 that it was intending to expand that efficacy waiver, the
13 EPA in 1982 said the reason why we think this can be done
14 is because suits can be brought against manufacturers who
15 put on the market ineffective products. We cited that on
16 page 31 of our brief.

17 JUSTICE KENNEDY: But do you take the position
18 that juries can do what a State regulation cannot do, or
19 are they much -- are they on a par?

20 MR. FREDERICK: Well, our broadest theory,
21 Justice Kennedy, is that the word requirements in 136v(b)
22 doesn't include common law claims at all.

23 JUSTICE KENNEDY: Suppose we disagree with that.

24 MR. FREDERICK: If you disagree with that, then
25 they would have to be the same, and that's why our point

1 about the existence of the parallel requirements is the
2 same.

3 I want to address the point of the discordance
4 between what State juries can decide and what State
5 regulators can decide because Dow and the Government have
6 featured that in their case. The Government in the
7 Medtronic case at page 27 of its amicus brief there said
8 there was no problem to be had with juries rendering
9 supposedly inconsistent decisions so long as they were
10 following one Federal standard. The Federal standard here
11 is clear: falsity. Tell the truth. That's what
12 manufacturers are obliged to do under the statute and
13 under the regulations.

14 JUSTICE BREYER: Yes, that's their strong point.
15 So what is the response to that? Because you can easily
16 get two juries in different parts of the country to decide
17 absolutely opposite things as to what the label should
18 say, and in those circumstances, they say, well, they're
19 in an impossible situation and that's why Congress passed
20 the statute, to be sure it would be EPA and not two juries
21 in different places.

22 MR. FREDERICK: First, the juries -- unlike a --
23 a declaratory judgment or an injunctive type remedy,
24 Justice Breyer, a jury for a common law damages claim is
25 not saying what affirmatively should be on the labels.

1 JUSTICE BREYER: I'm speaking practically. And
2 I don't have to go into all the argument.

3 MR. FREDERICK: Sure.

4 JUSTICE BREYER: You know the argument. It's a
5 very familiar argument.

6 MR. FREDERICK: Sure. The answer is that --
7 that Congress was prepared to accept a certain level of
8 disuniformity when it enacted 136v because it made very
9 clear in sandwiching the preemption provision of 136b --
10 surround -- by (a) and (c) that it was prepared to allow
11 States to depart in significant respects from what was
12 nationally uniform. And the way it did so was to say
13 States can regulate sale or use and they can also impose
14 extra requirements for special locations.

15 Now, what Dow did here I think illustrates the
16 way the system is supposed to work, which is that when a
17 problem was identified with their product in the States of
18 Texas, Oklahoma, and New Mexico, within 7 months it
19 petitioned the EPA to append to its national uniform label
20 a supplemental label. And that supplemental label says it
21 is for distribution in those three States only and it
22 provided 10 important changes to the label that it
23 otherwise had as a nationally uniform label. That's how
24 the system is supposed to work. If the incidental
25 regulatory effect of jury verdicts or common law claims

1 induces or causes some kind of change to the label, that
2 can be done without an adverse effect to national
3 uniformity through the supplemental labeling process. And
4 what Dow did here was it has its label and then it
5 attaches the supplemental label that addresses the
6 particular conditions that exist in the State.

7 And the EPA has recognized that as a perfectly
8 appropriate and valid way to address the geographic,
9 environmental, and climatic conditions that exist in the
10 different regions of the country that engage in
11 agriculture. There's nothing that is uncertain about that
12 if you accept the premise of the Government's argument in
13 Medtronic, which is that juries can be properly
14 instructed, if it came to that, so that they could follow
15 the appropriate Federal standard.

16 Now, I would like to turn -- sorry. Did you --
17 no, go ahead.

18 I would like to turn briefly to the -- the
19 requirements aspect of the case because we do think that,
20 under our broadest theory, this is a different situation
21 than Medtronic and Cipollone, and because of the important
22 statutory indications that are in the provision 136v.
23 Unlike in Medtronic, there is an explicit provision that
24 is a non-preempted provision, and that is different from
25 Medtronic. Where in Medtronic there was a provision that

1 allowed the FDA to impose its own decisions as to
2 requirements and whether or not the States should be
3 displaced, here Congress made the determination in 136v(a)
4 and in (c) that those kinds of requirements can be
5 imposed. They're in addition to what the Federal standard
6 is. That means that you have to look at requirements in a
7 somewhat different way because the States have this
8 authority that they did not have under the Medical Device
9 Amendments.

10 There's a textual indicator under (b) also which
11 refers to (a) in the sense that (b) says such State that
12 shall issue these requirements. Such -- the meaning of it
13 in Webster's means what has been already described -- is
14 in (a), and in (a) the States are authorized to promulgate
15 regulations. So we think that there is a textual basis
16 for distinguishing the word requirements that this Court
17 -- five Justices in this Court in Medtronic said would
18 encompass common law claims.

19 If there are no further questions at this time,
20 I'd like to reserve the balance --

21 JUSTICE BREYER: Let me ask one because I think
22 you'll hear some variation of this, and you have a minute,
23 which is the -- the statute sets up a perfectly good way
24 of keeping this branded stuff off the market. All any
25 complaining farmer has to do is to go to EPA and ask them

1 to pull it, and pulling it is an unbelievable sanction.
2 It's like the atomic bomb on the company. And so that's
3 very strong.

4 And the only thing that leaves out is the
5 possibility of damage remedies, but if you want your
6 damage remedy, just go to EPA and tell them to give it to
7 you because they can write the rule the other way that I
8 was suggesting.

9 MR. FREDERICK: Well, I don't think that EPA
10 could write a rule requiring damages to be done. It
11 doesn't have the statutory authority --

12 JUSTICE BREYER: They would just say it doesn't
13 preempt.

14 MR. FREDERICK: Well, there's no indication here
15 that EPA can do that kind of thing. In FIFRA, it
16 certainly doesn't have that kind of provision. I mean,
17 certainly there are different ways that the statute could
18 have been written. That isn't the choice that Congress
19 made.

20 Thank you.

21 JUSTICE STEVENS: Mr. Waxman.

22 ORAL ARGUMENT OF SETH P. WAXMAN

23 ON BEHALF OF THE RESPONDENT

24 MR. WAXMAN: Justice Stevens, and may it please
25 the Court:

1 FIFRA's preemption provision, which Congress
2 specifically amended in 1978 to add the title uniformity,
3 preempts by its terms, quote, requirements for labeling
4 different from those required under FIFRA.

5 JUSTICE SOUTER: Why -- why doesn't the other
6 amendment limit your argument? Because Congress has also
7 passed an amendment to the effect that unless EPA chooses
8 to get in to the business of -- of passing on efficacy, it
9 -- it need not do so. And in fact we know it is not doing
10 so. Why, therefore, doesn't the uniformity argument go to
11 those subjects that EPA does review for and why doesn't
12 the subject of efficacy, in effect, drop out of -- of the
13 -- the whole preemption claim?

14 MR. WAXMAN: There are -- there are two
15 fundamental reasons. The first is that it is a principal
16 requirement of FIFRA, and has been since 1972 and remains,
17 that a manufacturer may only sell a registered pesticide
18 with the precise labeling to the word and font size that
19 EPA has approved, and that requirement applies whether the
20 wording relates to human safety, environmental protection,
21 or efficacy.

22 Now, the specific amendment in 1978 was, as Mr.
23 Frederick indicated, represented a representation by EPA
24 to Congress -- and Congress' -- the -- the committee
25 report plainly indicates this -- that the EPA was not

1 saying we are no longer regulating efficacy, we are no
2 longer concerned with efficacy. What they said was
3 because the Department of Agriculture and the extension
4 services and the State universities are all involved in
5 this and, in particular, are involved in the statutory
6 requirement that before a manufacturer can even apply for
7 registration, even submit a registration application, the
8 manufacturer must do extensive, rigorous efficacy testing,
9 which Congress has indicated correctly is very expensive
10 --

11 JUSTICE GINSBURG: But it's not monitored at
12 all. The -- the manufacturer can say -- make up reports
13 and EPA is never going to look at them.

14 MR. WAXMAN: If the manufacturer makes up
15 reports, it has committed a felony. EPA can enforce it.
16 It can refer it to the Attorney General. It's just like
17 the --

18 JUSTICE O'CONNOR: But maybe it isn't a labeling
19 violation. I mean, there are claims made here that I have
20 trouble shoehorning into your theory. For instance, why
21 does a claim that Dow negligently failed to field test its
22 product on peanuts on acid soil impose a label
23 requirement?

24 MR. WAXMAN: Justice --

25 JUSTICE O'CONNOR: I -- I just don't understand

1 that.

2 MR. WAXMAN: Justice O'Connor, I think -- I will
3 address the negligent testing and, of course, the design
4 defect --

5 JUSTICE O'CONNOR: Yes.

6 MR. WAXMAN: -- discussion that's figured so
7 prominently in my colleague's argument.

8 It's very, very important to understand that
9 unlike in Sprietsma and Medtronic and so many of the --
10 and, for that matter, with respect to the preempted claims
11 in Cipollone, the claims that were preempted below, we
12 didn't file a rule 12 motion to dismiss. We couldn't have
13 with respect to at least one of those two claims. We
14 filed a motion for summary judgment that said with respect
15 to -- let me take design defect first. With respect to
16 design defect, it is possible under Texas State law to
17 state a claim for products liability under defective
18 design without impeaching the labeling.

19 And there is a brief filed in this case by Dean
20 Powers, the University of Texas Law School, for the -- the
21 Texas Chemistry Council who's an expert on Texas tort law,
22 and he goes through the Texas torts in detail to show why
23 they are all preempted and all invalid under independent
24 and adequate State grounds.

25 But what we did is we didn't move to dismiss.

1 We filed a motion for summary judgment, and in that motion
2 for summary judgment, we pointed the respondents in this
3 case to this Court's decision in Celotex v. Catrett, and
4 we said, in effect, we know that you can allege a design
5 defect claim without impeaching the labeling, but we think
6 that what you are complaining about does impeach the
7 labeling. Therefore, show us what you have.

8 Now, under rule 56, they had two alternatives.
9 They could have filed an affidavit or a request under rule
10 56(f), as this Court referenced in Anderson v. Liberty
11 Lobby, and said, hey, we don't know how this was made. We
12 don't know how this was tested. We don't know how this
13 was manufactured. We're entitled to discovery, and
14 district courts recognize that all the time. What they
15 did --

16 JUSTICE O'CONNOR: And they didn't do that?

17 MR. WAXMAN: They did not do that, and what they
18 did was to submit affidavits and documentary evidence,
19 including expert affidavits.

20 JUSTICE STEVENS: Mr. -- Mr. Waxman, you said
21 they didn't file a motion to dismiss. I thought you
22 brought the lawsuit.

23 MR. WAXMAN: We brought the lawsuit and we --

24 JUSTICE STEVENS: But then they couldn't file --

25 MR. WAXMAN: No, no, no. I said we didn't file

1 a motion to dismiss --

2 JUSTICE STEVENS: You didn't file a motion to
3 dismiss your own complaint?

4 MR. WAXMAN: No, no. Their counterclaims.

5 JUSTICE STEVENS: Oh, okay.

6 MR. WAXMAN: In other words, this wasn't decided
7 -- Mr. Frederick's reply brief talks over and over and
8 over again about how this was decided on the pleadings,
9 and you know, there was no discovery allowed. Under rule
10 56, they could have asked for discovery when we basically
11 said, okay, let's show our hands. We got two jacks. What
12 do you got? And what their expert said and what their
13 response said was if the 2001 amended label had been on
14 it, we wouldn't have been injured.

15 Now, rule 56(c) says that when you oppose a
16 summary judgment motion with affidavit evidence, the
17 burden is on the adverse -- the adverse party must by
18 affidavits, or otherwise provided in this rule, set forth
19 specific facts showing that there is a genuine issue for
20 trial, and they didn't do that.

21 Now, the classic design defect -- let me -- let
22 me give you an example.

23 JUSTICE O'CONNOR: Well, let's just try to boil
24 it down a little bit for my purposes. Do you concede that
25 there could be a claim based on no testing --

1 MR. WAXMAN: Well --

2 JUSTICE O'CONNOR: -- that there could be a
3 claim based on design defect, that there could be a claim
4 saying there were off-label oral statements made that
5 amounted to fraud or misleading --

6 MR. WAXMAN: I'll take them in your precise
7 order.

8 JUSTICE O'CONNOR: Okay.

9 MR. WAXMAN: Under Texas law -- and the court of
10 appeals opinion, the Grinnell opinion cited by the court
11 of appeals opinion, says this, as does Dean Powers. Under
12 Texas law, negligent testing is not an independent tort.
13 It is of necessity a subset of inadequate warnings. It is
14 an element of a -- the tort -- the claim of product defect
15 related to warnings. And so it is not possible under
16 Texas law, settled Texas law. Other States are different,
17 but Texas in its sovereign capacity has chosen to make
18 claims of negligent testing an element of the tort of
19 defective product by failure to warn, and that --

20 JUSTICE GINSBURG: And the way you proceeded in
21 this case, you made it clear that it would be impossible
22 for the Texas court itself to weigh in on this because you
23 jumped the gun. They wanted to proceed in Texas court,
24 and then we would have known what Texas law was on these
25 subjects. You said, no, we want to be in the Federal

1 forum.

2 MR. WAXMAN: We want -- as the -- as the Fifth
3 Circuit found and the district court found, we filed a
4 declaratory judgment in Texas after we received their
5 demand letters because we wanted this to be adjudicated in
6 a single forum, which the Texas venue rules would not have
7 allowed, and we -- we actually filed this in Lubbock,
8 Texas, which is the geographic center of where these 29
9 farmers operate.

10 Now, with respect to defective design, yes,
11 under Texas law if they had a -- they have to allege and
12 they have to prove that there is a safer alternative
13 design for this product, which they never even introduced
14 one quantum of evidence about. But --

15 JUSTICE STEVENS: It seems to me you're --
16 you're arguing the merits of the tort claims rather than
17 the preemption issue.

18 MR. WAXMAN: Well, what we said was your claims
19 are preempted if they impeach the labeling that we are
20 required by Federal law to use.

21 JUSTICE O'CONNOR: But they now say they don't.
22 They ought to be able to proceed on those claims. What do
23 we do with that?

24 MR. WAXMAN: Well, what this -- what -- what
25 happens under rule 56 --

1 JUSTICE O'CONNOR: And also the -- also the
2 claims of false, misleading statements outside the label.

3 MR. WAXMAN: Yes. I'm going to get to the false
4 and misleading statements outside the labeling in a
5 minute, but just to finish the design defect point, they
6 filed a complaint -- a counterclaim which had as a count
7 this was defectively designed. It is possible under Texas
8 law to prove that something is defectively designed. If
9 they had come in and said, but we filed a motion for
10 summary judgment that says here's our evidence and we
11 don't think that you can satisfy -- that you are, in fact,
12 complaining about a defective design --

13 JUSTICE STEVENS: But if they did allege a
14 defective design claim under Texas law, would that have
15 been preempted?

16 MR. WAXMAN: No. If -- if they had said, look,
17 the problem with this, which as footnote 9 of our brief
18 indicates, it's not a --

19 JUSTICE STEVENS: It seems to me your argument
20 is not whether there's preemption. It's whether there's a
21 State cause of -- State law cause of action.

22 MR. WAXMAN: No, no, no. It's -- it's both.
23 With respect to defective design, what we said is, your
24 claim is preempted because you aren't going to go to the
25 jury on defective design without impeaching the label. If

1 we're wrong, prove it in response to our summary judgment
2 submission.

3 JUSTICE SOUTER: But you can --

4 JUSTICE SCALIA: Is that their burden?

5 MR. WAXMAN: It is --

6 JUSTICE SCALIA: Is that their burden or is your
7 burden to show --

8 MR. WAXMAN: It is -- it is absolutely their
9 burden in -- as the responding party to a motion for
10 summary judgment, to show that there are material facts
11 that are either in dispute or there are material facts
12 that would allow them to go to the jury.

13 JUSTICE SOUTER: But on your theory there is no
14 material fact, it seems to me, because your -- you say
15 they cannot make good on that claim without impeaching the
16 label.

17 MR. WAXMAN: And they --

18 JUSTICE SOUTER: Every time they sue on the --
19 on the ground that -- let's say, that -- that the -- the
20 actual use was inconsistent with what the label described,
21 you could say, gee, if their theory is correct, we'd have
22 to change our label to say that what's on the label now is
23 in fact not properly descriptive of the product. So it's
24 not a -- a question of needing more fact. On your theory,
25 whenever they, in effect, sue on the basis of what you

1 say, your response is going to be, as a matter of law,
2 well, if they're correct, we'd have to say something else.
3 That impeaches the label. Therefore, preemption.

4 MR. WAXMAN: That is exactly right. What they
5 could have done in response to our motion for summary
6 judgment is to say this product assertedly harms -- when
7 it is applied before the seed is planted, will harm the
8 product it is -- the plant that it's supposed to protect
9 if the soil pH is too high. They could have easily have
10 come back and said if they had a -- a design defect claim
11 that didn't impeach the label to say you should have --
12 there was a way to manufacture this product. You could
13 have it in pellet form rather than in the soluble form or
14 if the problem was the alkalinity of the soil, there is a
15 way to design this so that it is dissolved in a more
16 acidic solution.

17 The classic case, which is referenced in the
18 NRDC brief, which has many, many examples of true design
19 defect claims that don't impeach labels, is a case
20 involving rat poison. It's a case called Banks v. ICI
21 America. It's a Georgia Supreme Court --

22 JUSTICE BREYER: So you quite clearly have both.
23 I understand that.

24 Let me ask you a question about the -- the
25 preemption point because what I think they're saying is go

1 read the red brief, your brief, pages 6 and 7, and there
2 you see a statutory requirement and you see regulatory
3 requirements, regulation. And I think one of their claims
4 is we are arguing that that statutory requirement, without
5 any change in the regulatory, that -- that it was
6 violated. These are false. They're misbranded. So we
7 are not imposing a requirement different from or in
8 addition to the requirement of Federal law. We are
9 enforcing a requirement that is the same as the
10 requirement of Federal law, and if, by the way, the EPA
11 were to think that tort suits in those circumstances in
12 practice are too disuniform, let them promulgate a
13 regulation to that effect. But they haven't.

14 Now, what -- what is the answer to that
15 argument?

16 MR. WAXMAN: The answer is threefold. Number
17 one, a challenge to a -- the wording of a statement on the
18 label on the grounds that it is false and misleading is --
19 does impose a requirement different than Federal law, not
20 the requirement that -- that labeling not be false and
21 misleading, but the fundamental requirement that a --
22 unless and until the EPA says otherwise, the manufacturer
23 can only sell this product with the precise labeling that
24 EPA has approved. And it -- if you look at page 63a --

25 JUSTICE GINSBURG: Mr. Waxman, do I --

1 MR. WAXMAN: -- of the joint appendix --

2 JUSTICE GINSBURG: Mr. Waxman, do I take it from

3 what you have just said that there is no -- even though

4 the statute prohibits misbranding, that there is no way

5 that that can be privately enforced, that misbranding is

6 something strictly for EPA to deal with, that the statute

7 has a prohibition on misbranding? I can see the argument

8 that all we're doing is enforcing the provision that says

9 no misbranding. So is EPA the only the player in the

10 misbranding --

11 MR. WAXMAN: Insofar as labeling is concerned,

12 the answer is yes, and that's because the statute -- the

13 statute has many, many instances in which it makes it

14 clear that in service of the objective of a nationally

15 uniform label, the expert agency that approves and

16 dictates the language of that label be the one to decide

17 what is or isn't --

18 JUSTICE STEVENS: Mr. Waxman --

19 JUSTICE BREYER: Where does it say that?

20 JUSTICE STEVENS: -- can I ask you one question

21 here?

22 JUSTICE BREYER: Because you were just going to

23 point out where it says that --

24 JUSTICE STEVENS: It goes to your --

25 JUSTICE BREYER: -- which I think is --

1 JUSTICE STEVENS: Excuse me.

2 JUSTICE BREYER: I'm sorry.

3 JUSTICE STEVENS: Just let me ask this one
4 question. Supposing the label says, this product contains
5 vitamin A. Period. And it doesn't contain vitamin A, and
6 they prove that in court. And you say you would have to
7 change the label. I suggest you could change the product
8 by putting vitamin A in it.

9 MR. WAXMAN: Well, you can -- you're --

10 JUSTICE STEVENS: Why isn't that an answer to
11 the misbranding? You change the product not necessarily
12 the label.

13 MR. WAXMAN: Because the difference between a --
14 that would be a -- a manufacturing defect, which are cases
15 that have been decided --

16 JUSTICE STEVENS: It would be a false statement
17 in the label. The label happened to be false, a
18 misrepresentation in it.

19 MR. WAXMAN: If -- if the -- if it contains --
20 I'm sorry. Was it vitamin A? If it contains vitamin A
21 because that's what the manufacturer intended and that's
22 what the manufacturer produced --

23 JUSTICE STEVENS: No. The manufacturer knew it
24 didn't contain it. He falsely put that in the
25 statement --

1 MR. WAXMAN: Oh, I see. Said that --

2 JUSTICE STEVENS: -- and -- and it's -- it's a
3 misbranded, false statement. Now, does he have to change
4 the label or could he change the product?

5 MR. WAXMAN: Well, I believe that you have --
6 you would have to -- I mean, would it be efficacious with
7 vitamin A? I don't know, but if it -- if it requires a
8 change in the label, it has to be done by EPA because the
9 manufacturer commits a Federal law violation if it sells
10 the product with any different label. If you -- if I can
11 just direct the Court's attention to --

12 JUSTICE STEVENS: No, but I'm suggesting he
13 could sell the product with the same label if he just
14 changed the product to correct the misstatement.

15 MR. WAXMAN: Well, the test, as the Fifth
16 Circuit stated, Justice Stevens, is whether a judgment
17 against Dow -- I'm quoting. Quote: whether a judgment
18 against Dow would cause it to need to alter the Strongarm
19 label. I'm -- and that's the -- those are -- that's the
20 test that was applied here and is always applied.

21 JUSTICE SOUTER: Okay, but why --

22 MR. WAXMAN: That is, does the State law cause
23 of action -- is it premised on a State law duty that there
24 -- that different labeling be used --

25 JUSTICE SOUTER: No, but neither --

1 MR. WAXMAN: -- that is, a little bit different
2 than what Federal law requires.

3 JUSTICE SOUTER: The problem that I think some
4 of -- several of us are having is that both the -- as I
5 understand it, the Fifth Circuit test in your argument
6 draws no distinction between the two following kinds of
7 situations. Situation A: there's something that the
8 manufacturer should have told you, should have put on the
9 label, but the manufacturer didn't. Situation B: the
10 manufacturer puts something on the label which in fact is
11 wrong and in Justice Stevens' example is in fact false and
12 it causes harm.

13 It makes sense, it seems to me, for preemption
14 purposes to say if the person who sues sues simply on the
15 ground that I bought it in reliance on the label, the
16 label was false, I should get damages for -- for whatever
17 harm was caused, that situation should be dealt with for
18 preemption purposes differently from the situation in
19 which the -- the manufacturer made no false statement. He
20 simply should have said more. And if -- if you don't
21 distinguish between those two situations, then the -- the
22 prohibition against mislabeling means absolutely nothing
23 because -- because it can never be enforced, in effect,
24 except with respect to some prospective user. It can
25 never be enforced with respect to the actual user.

1 MR. WAXMAN: Justice Souter, that is a choice
2 that Congress could have made. It is plainly not a choice
3 that Congress did make because it applied the preemption
4 provision to requirements that are either in addition to
5 or different than. And whether a label is assertedly
6 misleading because it fails to include something on the
7 EPA-approved label or --

8 JUSTICE SCALIA: Requirements for labeling or
9 packaging --

10 MR. WAXMAN: Yes.

11 JUSTICE SCALIA: -- that are in addition to or
12 different.

13 MR. WAXMAN: Yes. I -- I --

14 JUSTICE SCALIA: Requirements for labeling or
15 packaging.

16 MR. WAXMAN: Yes, and -- and if it -- if the --

17 JUSTICE SOUTER: Yes, and the argument that's
18 being made is that we ought to -- we ought to read -- we
19 ought to read the limitation, which Justice Scalia has
20 just described, with respect to labeling and packaging, in
21 a relatively narrow way to allow the suit to go forward
22 and, therefore, we ought to make a distinction between the
23 two kinds of situations.

24 MR. WAXMAN: The allegation in this suit -- the
25 claims in this suit -- and I -- I see that my time has

1 expired.

2 JUSTICE STEVENS: Ms. Blatt.

3 ORAL ARGUMENT OF LISA S. BLATT

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

6 MS. BLATT: Thank you, Justice Stevens, and may
7 it please the Court:

8 It would entirely destroy the uniformity
9 contemplated by -- contemplated by the statute if the EPA-
10 approved and mandated label were subject to jury-by-jury
11 invalidation based on a jury's determination of whether a
12 label is false.

13 JUSTICE SCALIA: This is a new position for the
14 Government, isn't it?

15 MS. BLATT: Yes, we have --

16 JUSTICE SCALIA: You used to take the opposite
17 position.

18 MS. BLATT: That's right.

19 JUSTICE SCALIA: And we're dealing here, as --
20 nobody has mentioned it, but there -- there's a clear
21 statement rule for preemption, isn't there? Doesn't the
22 preemption of -- of traditional State powers have to be
23 clear in the statute?

24 MS. BLATT: We -- we think subsection (b) is
25 unambiguous in preempting any statement.

1 JUSTICE SCALIA: It's -- it's ambiguous enough
2 that the Government -- the -- the chief beneficiary of the
3 -- of the supposed preemption didn't see it. It used to
4 come out the other way. How can you possibly say it's
5 clear?

6 MS. BLATT: Well, the agency is allowed to
7 change its position and we realize --

8 JUSTICE SCALIA: I understand. It's -- it's
9 welcome to change it, but it -- it's one thing to change
10 it. It's another thing to change it and come in to say
11 that the question is clear.

12 MS. BLATT: Well, we think that -- we realize
13 that our position was inconsistent with not only the
14 Court's decision in Cipollone and in Medtronic that
15 recognizes that requirement extends to common law duties.
16 But more importantly, a system where a jury by jury on the
17 same facts could come up with completely different reasons
18 why a label is false --

19 JUSTICE BREYER: All right. So -- so if you
20 have one administration thinking the one thing and the
21 other thinking the other thing, why isn't the answer that
22 the agency can promulgate the reg it wants? And therefore
23 if the reg -- if the agency comes to that conclusion, let
24 them promulgate that reg. And if a different one thinks
25 it can work with the tort suits, let them promulgate that

1 reg.

2 MS. BLATT: Well, unlike Medtronic where
3 preemption occurred by virtue of the FDA's regulation,
4 under FIFRA there's preemption by virtue of the statute
5 itself. And I just want to give one --

6 JUSTICE SOUTER: Yes, but why isn't there a big
7 difference, for purposes of your argument, between the
8 Medtronic situation and this one for the simple reason in
9 this case you've got a statute that authorizes EPA to do
10 absolutely nothing on the subject of efficacy? And EPA
11 does nothing on the subject of efficacy.

12 MS. BLATT: Well, that's just not true, with all
13 due respect. I mean, they -- the -- we don't verify the
14 accuracy of the efficacy labeling, but the requirement,
15 both in the preemption provision and in the requirement to
16 use the EPA label, clearly extends to efficacy.

17 And you can have disuniform context whether it's
18 safety or efficacy. Imagine a label that directs a
19 product to be mixed for 20 minutes. One jury could find
20 the label was false because the product should have only
21 been mixed for 10 minutes. Another jury in the same
22 courthouse could find the label was false because the
23 product should have been mixed for at least 30 minutes.

24 And this case is another really good example.
25 Now the petitioners are saying the label says that the

1 soil only should be a 7.2 level. Their expert says --

2 JUSTICE STEVENS: Yes, but the remedy to that
3 would not necessarily be to change the label. It might be
4 to change the quality of the product that requires how
5 much time for mixing.

6 MS. BLATT: And we think it's critical that our
7 position is that this statute only operates in the area of
8 labeling, and it preempts only those State labeling
9 requirements --

10 JUSTICE STEVENS: What do you say about my
11 vitamin A example?

12 MS. BLATT: I think your vitamin A example is an
13 excellent example of a non-preempted claim. If a
14 manufacturer says that this is a pesticide and he puts
15 Clorox in the bottle, the plaintiff wants to get to the
16 jury on the theory that a reasonable manufacturer would
17 not have used Clorox. He would have used the pesticide.
18 If the argument, on the other hand, is Clorox was fine. I
19 don't have a problem with Clorox, I just wish I would have
20 been given a warning, but that's not the way a plaintiff
21 would frame his complaint.

22 We think it's critical that our theory is if the
23 plaintiff's theory of recovery is necessarily --
24 necessarily predicated on a requirement that the
25 manufacturer used a label different than the EPA-approved

1 label the Federal law required it use --

2 JUSTICE O'CONNOR: Well, let's -- let's be
3 specific here. If it's a failure to test, if it's a -- a
4 design defect requirement, if it's an off-labeled, false
5 misrepresentation, why are they preempted?

6 MS. BLATT: On the face of the complaint, we
7 agree that they're not preempted. Our only position is by
8 the time it got to summary judgment, the courts decided
9 that they had no evidence on what would have been non-
10 preempted claims. If another farmer wants to bring an
11 expert that says Strongarm can be manufactured --

12 JUSTICE STEVENS: But then do you endorse the
13 theory of the court of appeals in this case?

14 MS. BLATT: Well, we think the court of appeals
15 took it claim by claim and read the affidavit -- or at
16 least the district court did --

17 JUSTICE STEVENS: And you think just mere
18 inducement to change a label is sufficient to create
19 preemption.

20 MS. BLATT: Mere inducement only to the extent
21 that that's a shorthand way of saying the label was --
22 necessarily had to be required. Let me give you an
23 example.

24 JUSTICE SCALIA: If Congress wanted that, surely
25 it could have stated it more clearly than simply saying

1 the State shall not impose or continue in effect any
2 requirements for labeling or packaging. A tort suit
3 because of -- of mislabeling is not a requirement for
4 labeling or packaging.

5 MS. BLATT: If the --

6 JUSTICE SCALIA: And if Congress wanted to say
7 that, they could have said it.

8 MS. BLATT: Well, I think they did say if a
9 common law duty is necessarily premised on the requirement
10 that the manufacturer used a different label than Federal
11 law required him to use. In this case, the common law
12 duty of a failure to warn is saying the manufacturer
13 should have put something on --

14 JUSTICE SCALIA: You have -- you have that
15 provision which talks about requirements for labeling or
16 packaging in conjunction with another provision that
17 authorizes the State to regulate the sale or use.

18 MS. BLATT: The --

19 JUSTICE SCALIA: I mean, you -- you have to make
20 sense of the two.

21 MS. BLATT: Right, and that's --

22 JUSTICE SCALIA: And it seems to me that means
23 the State can impose certain requirements upon the seller
24 to the consumer --

25 MS. BLATT: Not on labeling. Justice Scalia,

1 every day --

2 JUSTICE SCALIA: Well, every change -- virtually
3 every change -- virtually everyone -- if -- if you believe
4 the respondent's theory, virtually any State regulation of
5 the substance of the sale will require a change in the
6 label.

7 MS. BLATT: That's just not true. Every day
8 States and localities around the country are imposing use
9 restrictions. They tell -- they tell applicators and
10 users when and where to apply the pesticide and what types
11 of --

12 JUSTICE SCALIA: Sale -- sale or use is what it
13 says.

14 MS. BLATT: That's right and they --

15 JUSTICE SCALIA: Say -- if they regulate the
16 sale or use.

17 MS. BLATT: That's right, and they do that every
18 day without imposing labeling requirements. Imagine --
19 imagine --

20 JUSTICE SCALIA: Give me sale examples.

21 MS. BLATT: They require the manufacturer, in
22 order to sell the product, be registered with the State,
23 and they can impose whatever sale restrictions they
24 want --

25 JUSTICE KENNEDY: And can they --

1 MS. BLATT: -- that don't go to the labeling.

2 JUSTICE KENNEDY: Can they do the same thing by

3 -- through jury verdicts?

4 MS. BLATT: Absolutely not. It would be bad

5 enough if a manufacturer had to shop his label around 50

6 States and had each --

7 JUSTICE KENNEDY: So now -- so now you say a

8 State can do something by regulation that a jury can't do.

9 MS. BLATT: No. A State absolutely cannot

10 impose labeling restrictions on a manufacturer.

11 JUSTICE KENNEDY: I'm asking if the -- if juries

12 can do anything that the -- are -- are prohibited under

13 your view from doing anything that the State could do by a

14 State regulation.

15 MS. BLATT: Right. I'm sorry. Right. Under --

16 it -- the alternative theory would give more power to the

17 jury to impose labeling restrictions than the State, and

18 we don't think the State can do it. And it would be far

19 more pernicious if a label were subject to jury-by-jury

20 invalidation. No one would read the label, much less

21 understand it.

22 JUSTICE GINSBURG: Ms. Blatt, there's a brief in

23 this case -- there's a brief in this case that just shows

24 hundreds, if not thousands, of crop damage claims. And

25 your theory is that with this ambiguous provision Congress

1 wiped all that out. It's hard to believe.

2 MS. BLATT: No. Congress just wiped out
3 labeling and only those labeling requirements --

4 JUSTICE GINSBURG: But everything becomes -- but
5 every -- every time -- my crop was stunted. Okay. You
6 have to change the label so you can't bring that suit.

7 MS. BLATT: Justice Ginsburg, it's just not
8 true. The lower courts well understand this distinction,
9 and they -- they let go all the time claims as not
10 preempted that are true manufacturing defect or true
11 design defect claims. This is not a complete immunity.
12 This is a narrowly targeted one as to labeling.

13 There is a famous example of the Benlate --

14 JUSTICE GINSBURG: He says their claim is -- is
15 very simple. You didn't tell us that using this in our
16 kind of soil would stunt the crop and wouldn't kill the
17 weeds.

18 MS. BLATT: Right.

19 JUSTICE GINSBURG: But you're saying that kind
20 of claim can't be brought anymore.

21 MS. BLATT: It can be brought if there's State
22 law and evidence to support the State law that doesn't
23 attack the labeling. And our --

24 JUSTICE GINSBURG: I've described a set of facts
25 which your position I think you have to say affects the

1 label. The -- the farmer says I bought this bottle. It
2 said okay for all peanuts. My crop grew and it was
3 stunted and the weeds stayed alive.

4 MS. BLATT: If they found an expert that said if
5 you had manufactured this differently or if you had
6 designed it differently and there was evidence to support
7 that, our view is that those claims aren't preempted. And
8 the alternative to let juries --

9 JUSTICE GINSBURG: No. I'm not giving you that
10 case. I'm giving you exactly what happened.

11 MS. BLATT: This case -- they didn't have any
12 evidence other than saying that the label was inaccurate.
13 But the next -- another jury could rely on the
14 respondent's evidence to say the label was inaccurate
15 because it works better on high pH soil, and another jury
16 could say, well, we need a margin of safety and the label
17 should have said 6.8 instead of 7.0, which is what their
18 expert says. And you can have this time and time again
19 with how often the pesticide has to be applied, when it
20 has to be applied. And to -- and the -- the whole point
21 of section 136v(b) was to have reliability --

22 JUSTICE GINSBURG: Was that happening when EPA
23 took the opposite view? Was there this tremendous
24 disparity with juries going every which way --

25 MS. BLATT: Well, there's -- there's been

1 preemption at least since the late '80's, and I don't know
2 of cases where juries -- or the theory for recovery was
3 invalidating the label.

4 There are lots of cases that are true
5 manufacturing defect claims, and I direct your attention
6 to the Benlate where the manufacturer contaminated his
7 product. If I'm the plaintiff, my theory -- the theory
8 was you mismanufactured this product. A reasonable
9 manufacturer would have taken practices to prevent
10 contamination, and it destroyed a lot of crops and EPA
11 actually took enforcement action against that
12 manufacturer.

13 The rat poison example -- a 9-year-old kid died
14 of rat poisoning because it tasted like a candy bar. The
15 theory of recovery was all the manufacturer had to do was
16 put a bittering agent in it that would have made the kid
17 throw up and the rats still would have loved the
18 poisoning. That has nothing to do with the label.

19 JUSTICE STEVENS: Thank you, Ms. Blatt.

20 You have about 4 minutes.

21 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

22 ON BEHALF OF THE PETITIONERS

23 MR. FREDERICK: I just have two points to make.

24 With respect to the summary judgment posture of
25 the case, the way this unfolded was that on one day the

1 district court decided the motion for jurisdiction, that
2 it had jurisdiction. On the very next day, Dow rushed
3 into court with its motion for summary judgment. And what
4 Mr. Waxman cites as the Celotex invocation merely says
5 that on -- on this point it is neither unfair nor
6 premature to require defendants to produce evidence in
7 support of their claims now as the Celotex trilogy
8 requires. I'm reading from their motion for summary
9 judgment. That was filed before the counterclaims.

10 The only thing that they knew about was the
11 deceptive trade practices notice letter that the farmers
12 had filed pursuant to State law. So they didn't know what
13 our claims were, and they were requiring or saying that
14 the district court could throw us out of court without
15 giving us any opportunity to file counterclaims, much less
16 try to develop evidence that would prove them.

17 Now, with respect to the disuniformity point,
18 when Congress amended the statute in 1988 to add the word
19 uniformity, it said in that public law that it was a
20 technical amendment. We don't know why Congress put the
21 word uniformity in. The legislative history is barren.
22 It just says this is a technical amendment. It didn't
23 change the substantive provisions that empowered States to
24 impose regulations that would have the effect of
25 disuniformity.

1 Now, at the end of the day, we've got claims
2 that have been brought historically since the late 19th
3 century. Until EPA had a sudden change of heart, there
4 were decades in which juries made these decisions with
5 respect to these kinds of products, and those preemption
6 decisions really didn't take hold until after this Court
7 announced Cipollone in 1992. And it was only at that
8 point that the courts began to have preemption, but for
9 the previous 2 decades, juries routinely decided these
10 kinds of cases. The sky did not fall. EPA didn't come in
11 and say there's labeling disuniformity as a result of
12 this. There simply were no problems. But what did happen
13 was that the farmers who used products were able to get
14 compensation when pesticides damaged their crops.

15 Thank you.

16 JUSTICE STEVENS: The case is submitted.

17 (Whereupon, at 12:01 p.m., the case in the
18 above-entitled matter was submitted.)

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